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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

NO. 571

GARY JAMES SYLVIA, Petitioner

vs.

THE STATE OF FLORIDA, Respondent

REPLY BRIEF FOR THE PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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It is the position of Respondent that Bruton v. United States, ____U.S.____, 20 L.ed2d 476, is inapplicable because there is no actual confession in the case at bar and no denial of a right of confrontation required under the Sixth Amendment. The elements of Bruton are, however, present in this case.

b) The right of confrontation does in fact exist but only theoretically. From a practical point of view it is as absent here as it was in Bruton. In the case under consideration no trial attorney would conceivably cross-examine a co-defendant's witnesses seeking to establish the defense of entrapment. If he did the effect of confession inherent in entrapment would be present without the implicit denial of guilt. Entrapment as a defense includes confession and avoidance. The avoidance of confession would have been contradicted by the cross-examination. From a practical point of view, therefore, the witnesses could not and should not have been cross-examined.

In Bruton the Court not only decried the absence of the right of confrontation but also recognized the fallibility of the contention that jury instructions are a cure-all. That phas of Bruton, supra, is also present in the case at bar. Thus, it is respectfully submitted that Bruton does, in fact, apply.

More important, however, it would seem that this case includes the deprivation of procedural due process and a fair trial guaranteed by the Fourteenth Amendment and referred to in the dissenting opinion of Douglas v. Alabama, 380 U.S. 415, 13 L.ed2d 934, 85 S.Ct. 1074 and Pointer v. Texas, 380 U.S. 400, 13 L.ed2d 923, 85 S.Ct. 1065.

Counsel for Petitioner did not seek a severance without attempting to save the

situation and provided an alternative method of securing a fair trial under the circumstances. At the termination of the State's case he moved the court to submit the case to the jury to determine Petitioner's guilt or innocence prior to the submission of any testimony. Had that been done a fair trial would have been afforded Petitioner; no mistrial would have been necessary; no severance would have been required and the co-defendant also could have submitted his case in the manner he thought most appropriate to his contention and theory of the case. That was not done.

This record is perhaps different in some respects from those reflected by current reported opinions. It is respectfully urged that the violent disagreement between counsel as to procedure not personalities, warranted a severance of the cases. The record further discloses not only disagreement as to the presentation of evidence at the termination of the State's case but strong expressed conflict as to the use of particular witnesses proposed to be put on the stand as witnesses for the defendant. Permitting those witnesses to be heard by the jury as witnesses for the defense in effect created the supremacy in the trial of the case of the co-defendant's counsel as opposed to Petitioner's counsel. The right to counsel with the attendant reliance on counsel's presentation of his defense was certainly diluted by the procedure.

The deficiencies were recognized by the opinion of the District Court of Appeal, Third District of the State of Florida. That court conceded that severance might have been preferable. It would seem that if one is entitled to a fair trial one is entitled to as fair a trial as it is possible to attain. When the court recognized that severance might have been advisable or preferable under the circumstances it recognized that Petitioner had not been afforded as fair a trial as was easily possible under the circumstances in the trial court.

CONCLUSION

For the reasons submitted here as well as in Petitioner's original brief it is respectfully urged that the case merits full consideration by this Court and that the issuance of the writ is appropriate.

Respectfully submitted,

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I HEREBY CERTIFY that a true copy of the foregoing Reply Brief for the Petitioner in Support of Petition for Writ of Certiorari was mailed to Arden Siegendorf, Esq., Assistant Attorney General, Attorney for Respondent, 1350 N. W. 12th Avenue, Miami, Florida, this_____day of November, 1968.

_____

Milton E. Grusmark